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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 298

S. M. NICKEY, ET AL.,

VS.

STATE OF MISSISSIPPI, EX REL,
GREEK L. RICE, Attorney General.

SUPPLEMENTAL BRIEF FOR APPELLEE

It will be borne in mind that this suit was begun by the attachment of lands of the defendants in the State of Mississippi; and if the defendant had not appeared in the case, we certainly would not contend that the Court in this case could consistently with the Constitution enter a personal decree against them. Had defendants not entered their appearance we would have requested, as prayed for in the bill, that the Court enter a decree directing that the property attached be sold for the payment of the debt claimed. Certainly no question of due process can now arise in regard to cases where without personal service the property of non-residents is seized and subjected to the payment of a debt. Our statute provides for such proceedings and such cases are so common both in our Circuit Court and in our Chancery Court that one must engage in the practice of law to a ripe old age without finding

it necessary to go to the decisions of our high Federal Court for authority to justify such proceedings. The Mississippi statute relating to attachments is very mild in comparison with the Delaware statute which requires that the non-resident, before he can defend an attachment suit, must give bond or other security for the payment of such judgment as may be rendered against him in the case. Of course, in Mississippi, he may give bond and secure a release of the attachment, but in Delaware, he must give the security, otherwise he will have no standing in court. The validity of this statute was challenged in the case of *Owenby vs. Morgan*, 266 U. S. 94, 65 L. Ed. 837, in which it was contended that the statute deprives non-residents of due process of law. The Court held that such was not true in any case and particularly in the case then under consideration where it appeared that the defendant had acquired the property right and absented himself from the State after the practice was established and hence with notice that his property situated there would be subject to disposition under an attachment by the very method that afterwards was pursued and the Court said further:

> "The property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed ex necessitate to consent that the State may subject such property to judicial process to answer demands made against him in his absence, according to any practical method that reasonably may be adopted."

However important it may be that the State should provide methods of procedure whereby their citizens may

collect debts owing to them by those out of the State, obviously it is of much more importance that the state, itself, shall have every reasonable remedy for the collection of debts due it by property owners, whether resident or non-resident, so that the very life of the State may be preserved and its function of protection of the property of such owners continue. Nor would anyone doubt that a remedy which is deemed reasonable for the collection of a private debt must so much the more be deemed reasonable for the collection of debts due the State. It will be remembered that the attaching creditor is not required to have a personal judgment against a debtor before he can proceed by attachment. It is only necessary that the attaching creditor shall claim that there is a debt owing to him by the defendant. He may claim a liquidated debt such as a promissory note may evidence, or he may claim an unliquidated debt and in either event the Court would determine in the attachment suit whether such debt existed and if it so found, it would subject the attached property to the claim so found, but of course would render no personal judgment or decree unless there was an appearance or personal service. So the State may proceed by attachment and in this instance is so proceeding for the collection of a debt arising from its statutes levying taxes and now liquidated by reason of the fixing of the tax rate, either by the statute or in the manner provided by the statute and by reason of the valuation of the property by proceeding under the statute. It was entirely proper for our highest Court to say that no personal judgment can be rendered without personal service of process, but this statute in no way embarrassed the Supreme Court in afterwards holding that a

sovereign state could subject any property in its jurisdiction to the payment of any debt due it by the property owner.

In the *Frick case* (268 U. S. 473, 69 L. Ed. 1068) the Court says:

> "A State may so make its tax laws as to reach every object which is under its jurisdiction."

The Court did not then have under consideration a specific tax on specific property, but the Pennsylvania succession tax, collectable out of the whole estate within the State of Pennsylvania. So far as we know no State has adopted a succession or estate tax whereby the separate items of property are valued and taxed separately, and we are not interested in considering whether or not such an estate tax would be valid. It is clear however under the Frick case and other cases that a State may so frame a tax law that the whole of the property taxed may be liable for the entire tax. If Mississippi can do this with its estate tax, it can hardly be doubted that it would be entirely within the Constitution to enact a general tax statute whereby all of the property of a given taxpayer within the jurisdiction of the State would be liable for all of the annual taxes required of such taxpayer, and little, if anything more than this, is done by our statute which makes our taxes a debt.

In the early case of *Den v. Hoboken Land & Improvement Co.*, 18 Howard 272, 15 L. Ed. 372, involving a distraint for taxes due the United States, the Court said:

> "The power to collect and disburse revenue, and to make all laws that shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution."

The main reliance of the defendant appears to be on the case of *Dewey v. Des Moines*, 173 U. S. 193, 43 L. Ed. 665, and it seems that they construe the opinion in that case as holding that without personal service a State cannot subject to the payment of a tax, anything except the property against which the tax was levied, although the taxpayer may have other property within the jurisdiction of the State. With all deference for the views of our able and learned opponents, who evidently have given much study to this case, we submit that they misconstrue the holding in the Dewey case and seek to give to it effect which the United States Supreme Court has considered and declined to give.

In the case of *Scottish Union and National Insurance Co. vs. Bowland*, 196 U. S. 612, 49 L. Ed. 619, it appeared that the insurance company for a number of years had maintained bonds with the insurance department of the State under a state law requiring them to do so and as a condition to doing business in the State. These bonds were subject to taxation and under provisions of the state statute, steps were taken to assess the bonds for taxes, not only for the current year but for several years preceeding. After the proceedings were begun and before the assessment became final for the current year, the company took the

bonds out of the State and substituted therefor tax-exempt bonds of the United States which were left on deposit with the insurance department. When the assessment became final, the tax collector seized the United States bonds and sought to have them sold to satisfy the taxes on the bonds which had been withdrawn. The insurance company obtained an injunction against the proceedings by the tax collector. In the United States Supreme Court, it was held that the section of the Ohio statute authorized the distraint of goods to satisfy taxes lawfully levied within the county and state and said:

> "This method of collecting taxes is one of the most ancient known to law, and frequently received the sanction of the Courts." (Authorities cited).
>
> "There is nothing in the exemption of government bonds from taxation which prevents them from being seized for taxes due upon non-exempt property. We have held that the taxes were lawfully assessed. The statute authorizing a distraint gave the right to proceed against personal property within the jurisdiction of the State. The taxes were lawful, and the property belonging to the foreign corporation which could be seized within the authority of the State might be taken under this statute, and we do not perceive that any constitutional right is violated by seizing this property under such circumstances."

In holding that the injunction should not have been issued because of any question of personal liability of the

insurance company to a judgment in an action brought to recover the amount of the taxes, the court said:

> "If there is no personal liability for these taxes,—a point which we do not feel called upon to decide,—it is perfectly clear, that, if service could be had which would make a personal judgment good, the company could set up its defense to an action at law and there is no necessity to resort to a court of equity for relief. It will be presumed, if the company is right, no personal judgment will be rendered against it, and, if its theory of the controversy is correct, no such judgment could be lawfully rendered."

We think that our contention that a sovereign state may without personal service make a valid assessment of property within the state belonging to a non-resident and may thereafter subject not only the property assessed but also any other property of the non-resident within the jurisdiction of the State to the payment of such tax, is fully supported by the case of *Bristol v. Washington County*, 177 U. S. 133, 44 L. Ed. 701. We respectfully submit that the holding in the Bristol case eliminates entirely any question of lack of due process of law from the case at bar. It appears from the opinion in this case that Sophia M. Bristol was a resident of the State of New York and owned property in the State of Minnesota. She died and her will was probated first in New York and then in Minnesota and the executor qualified in the latter state. For about ten years preceeding her death, she was not in the State of Minnesota except temporarily and the whole time she spent in that State during that period was about one year, but she had an agent in Minnesota who represented her by

collecting certain notes held by him for her and due from citizens of Minnesota. For the years 1883 to 1894, personal property taxes were assessed against her by the taxing officers of the city of Killwater, Minnesota, and Washington County, Minnesota, on the personal property of the said Sophia Bristol in that city and county. A claim was filed in Minnesota against her estate for the amount of these taxes and the Court found that the taxes had all been fairly assessed on a fair valuation of the personal property of the said Sophia Bristol for each of said years and further found that Washington County was entitled to judgment in the amount of the taxes and penalties. On appeal to the United States Supreme Court, the opinion was handed down by Chief Justice Fuller and the following are excerpts from the opinion:

"The judgment amounted to the allowance of the claim payable in due course of administration out of the assets of the estate within the jurisdiction of the Probate Court. This was so notwithstanding the domicile of the testatrix and of her executor was in the State of New York and that that was the place of principal administartion; and that the person charged therewith was the same."

"Accepting the views of the State Court in relation to the state statute and proceeding thereunder, and concluding that the Constitution of the United States did not operate to prohibit the power to tax these investments, it follows that the Probate Court did not err in sustaining the validity of the taxation; but it is further contended that as Mrs. Bristol was a non-resident, the power should be exercised against the very property tax-

ed; that these assessments did not constitute judgments in personam; and judgment against her estate could not, therefore, be rendered upon them. The state statute provided that taxes should be preferred to ordinary debts, and, as has been seen, the Supreme Court has decided that 'for the purpose of proof and payment out of the estate, a personal tax is a debt'. The Court, for that purpose, so treated taxes, but not as being debts in the usual acceptance of the term. The obligation to contribute to the suport of government is not dependent on contract, but on the exercises of the public will as demanded by the public welfare."

It further appears from the opinion, that under the laws of Minnesota, when personal property taxes became delinquent, a warrant could be issued for the distraint of the goods and chattels of the taxpayer, for personal judgment on service of citation and also provided for proceeding against non-residents by attachment and publication of notice, and the Court said further:

"Thus, it appears that upon the return of the delinquent tax list, the amount of the tax could be collected by the distraint of goods and chattels, or by proceeding by attachment and publication, judgment on which would operate on the property taken in attachment, by garnishment or otherwise. There was no want of due process in all this, for while the non-resident came under the obligation to pay, appropriate notice and opportunity to contest were afforded. And if a personal action were brought and service obtained the defendant would not be cut off from any com-

> petent defense, as the delinquent list would not necessarily be held to be conclusive. In this case, no defense upon the merits appears to have been relied on except the want of service."

Just as in the case at bar, the case of *Dewey v. Des Moines* was cited by counsel for the Bristol estate and the Court said that that case was not contrary to the holding, and explained:

> "What was ruled there was that a citizen of one State cannot be cast in a personal judgment in another State on an assessment levied there on real estate for a local improvement, without service on him, voluntary appearance, or some action on his part amounting to consent to the jurisdiction."

We respectfully submit that on the question of due process, the holdings in the Bristol case are conclusive on the defendant and the contentions of our learned opponents. In fact, if their ages did not prevent the supposition, we might easily be persuaded that they were of counsel for the Bristol estate in that case. For, was it not contended that the Dewey case forbade the collection of the delinquent taxes? Was it not also contended that the taxes should be collected only from the specific property against which the taxes were assessed? Again, was it not contended that these assessments, made annually, over a period of about ten years during which Mrs. Bristol was living, constituted void personal judgments for the reason that there was no personal service of process?

All of these contentions were made on behalf of the

Bristol estate as they are now made on behalf of the Nickey brothers. All of them were considered and discussed by the Court and held to be without merit. Of course in the Bristol case all of the property of the non-resident decedent was in a sense in the custody of the Court by reason of the pending administration and there was no need of a distraint or an attachment. No distinction is to be drawn on this account. It was merely a question of realizing against the estate of a decedent on a claim for taxes which arose from year to year against the decedent during her lifetime and it cannot be doubted that if the taxing authorities had been active in an effort to collect the taxes during Mrs. Bristol's lifetime, whether by distraint or attachment or any other proper procedure, the answer of the Supreme Court to the contentions made would have been the same.

We respectfully submit, therefore, the judgment of the Supreme Court of Mississippi should be affirmed in this cause.

GREEK L. RICE, Attorney General,

DULANEY & BELL,

E. C. SHARP,

R. H. KNOX,

Of Counsel.

I hereby certify that I have this day mailed, postage prepaid and properly addressed to Messrs. Gore & Gore, Jackson, Mississippi, care of State Tax Commission, Attorneys for Appellant, a true copy of the above and foregoing Supplemental Brief.

This the second day of December, 1933.

E. C. SHARP,

Associate Counsel.